

TOWN OF KITTERY, MAINE  
PLANNING BOARD MEETING  
Council Chambers

APPROVED  
June 27, 2013

Meeting called to order at 6:12 p.m.

Board Members Present: Deborah Driscoll, Tom Emerson, Susan Tuveson, Bob Melanson, Mark Alesse, Ann Grinnell, Rich Balano

Members absent:

Staff: Gerry Mylroie, Planner

Pledge of Allegiance

Minutes:

June 13, 2013

Ms. Tuveson moved to approve as amended

Ms. Driscoll seconded

Motion carried unanimously by all members present

Public Comment:

Public comment and opinion are welcome during this open session. However, comments and opinions related to development projects currently being reviewed by the Planning Board will be heard only during a scheduled public hearing when all interested parties have the opportunity to participate.

Gail Burns, Wilson Road, would like copies of any zoning documents under discussion affecting the rural areas of Kittery. Are sidewalks in residential rural areas really necessary? Rural areas in urban areas are important, but the use of farm equipment on rural roads cannot pull over if sidewalks are in place. Perhaps a shared bike and pedestrian path could be installed instead of sidewalks, instead of imposing sidewalks on rural roads and areas. Private roads in rural developments should not be required to have sidewalks that would encourage access by individuals not residing in these private developments.

Richard Sparkowich, 22B Old Farm Road, Operation Blessing Limited Partnership, referred to emails from a neighbor sent to Planning Board members regarding a recent incident at Highpointe Circle. He felt the incident has been over blown, and asked if Members received emails from him and residents of Highpointe Circle.

Mr. Emerson stated this issue will be discussed later, but they must determine what their role is, if any, in this issue. He explained that emails to him are forwarded to the Planning staff and are not forwarded to other members or responded to by him. Emails forwarded to staff are then forwarded to Board members for their information and retained in the applicant's file. Ms. Tuveson stated she had received the emails, but Board members may not respond. Mr. Sparkowich stated he felt these issues are civil issues.

The Public Comment session ended at 6:26 p.m.

Mr. Mylroie stated a slide presentation on sidewalk design and walking paths will be forthcoming to the Board.

## PUBLIC HEARING

ITEM 1– Town Code Amendment - Chapter 11, Marine Development, Title 16 Land Use Development Code. Amendments include changes to procedures allowing for Port Authority application submittal prior to obtaining State and Federal permit approvals.

Mr. Mylroie stated this was initiated by the Port Authority and staff is comfortable with the proposed amendment and summarized the proposed changes.

The Public Hearing opened at 6:41 p.m.

Milton Hall asked why public hearings for code amendments by the KPA and Planning Board are needed prior to Council review.

He noted that when Ken Lamont was chairman of the KPA, the approval letter noted approvals by state and federal reviewing authorities were required. Somehow Title 16 was revised to its current language, though the CEO requires all permits be in place before a building permit is issued.

The PH closed at 6:43 p.m.

Ms. Grinnell moved to amend Chapter 16.11.1, Chapter 16.11.2 and 16.11.3

Ms. Tuveson seconded

#### Discussion

Mr. Melanson explained the KPA reviews only those applications that require conformance with the Port Authority rules and regulations, however, it is unclear which review process occurs first, or whether applications should be reviewed concurrently. Discussion followed regarding coordination of review between the KPA, Planning Board and Board of Appeals. Mr. Emerson suggested the Planning Board would be the first review and, if required, an applicant would be remanded to the Board of Appeals.

Mr. Balano arrived at 6:46 p.m.

The following changes were agreed upon by the Board:

[New language]:

*16.11.1.G. The Kittery Port Authority (KPA) through its established Rules and Regulations reviews and approves applications for piers, wharves, landings, floats, bridges, and other water-dependent structures or uses. Applications are available online and at the Town Offices and are submitted to the Planning and Development Department with the required copies and application fee. Applications that contain upland development within 100 feet of the upland edge of a coastal or freshwater wetland, must be submitted as a separate application for Planning Board review and approval and include all information requires in 16.11.2 below.*

*16.11.1.H. KPA applications must be reviewed by the Town Planner and Code Enforcement Officer prior to the KPA Chairperson reviewing for completeness and placement on the Port Authority's agenda.*

Remove 16.11.2.A and substitute new language:

*A. All applications for Shorefront Development must include the following:*

Remove 16.11.2.B in its entirety.

Renumber standards for review under 16.11.2 A.

Revise standard 16.11.2.E as follows, and change numbering to be consistent:

*8. The applicant must show at submittal that all necessary applications for permits, leases, approvals and any supporting documentation as may be required have been filed, including the following:*

- a. *Department of Environmental Protection permit application pursuant to the Natural Resources Protection Act, 38 M.R.S. §480C;*
  - b. *Army Corps of Engineers permit application;*
  - c. *Maine State Department of Conservation, Bureau of Parks and Lands, Submerged Land Coordinator application; and*
  - d. *Building permit application.*
9. *Any other details requested by the Planning Board or Port Authority.*

Revise 16.11.3. as follows:

A. *All applications containing upland development requires Planning Board review.*

Remove:

16.11.3.C. *If Planning Board or Board of Appeals review is required as an integral part of the proposed development, the Planning Board or Board of Appeals review will be completed prior to Port Authority Review.*

Renumber remaining sections to be consistent.

Add language:

16.11.3.E. *All required local, federal and state approvals must be received prior to the issuance of a building permit by the Code Enforcement Officer.*

Revise:

16.11.3.F to reflect word [underlined] change:

G. *Prior to the commencement of construction....the owner and/or developer must apply for and obtain a building permit....*

Board members discussed the lack of definitions for shoreland and shorefront.

Ms. Grinnell moved to withdraw her motion to accept code amendments pending receipt of the proposed revisions in final draft

Ms. Tuveson second

Members requested the discussed changes be incorporated into the revised amendment and be returned for discussion

Motion carried unanimously

Break

## OLD BUSINESS

ITEM 2– Town Code Amendment – 16.10.9.2 Field Changes and 16.10.9.3 Modifications to an Approved Plan, Title 16, Land Use Development Code. Discuss what changes may be required to meet the goals determined by the Board.

Board members discussed the need for minor and major field changes as they did not want site changes to approved plans allowed without Board review. Examples were discussed, such as plant changes or moving a handicapped parking space from one location to another as minor field changes vs. plan modifications. Applying a financial cost to changes was discussed. Earldean Wells stated for items that had been reviewed for approval, any changes should be reviewed by the Board. For example, omitting \$1000 in plant materials could have a significant impact on the project approval.

Discussion followed regarding Title 16.10.9.3 Modifications to an Approved Plan. It was noted that all Board approved projects have a standing condition, 16.10.9.1.2 *No changes, erasures, modifications or revisions may be made to any Planning Board approved final plan.* Following discussion, the Board recommended removing Section 16.10.9.2.A. Minor Field Changes and retain only the following language:

*Section 16.10.9.2 If at any time during the construction of the required improvements, it appears necessary or desirable to modify the required improvements, major plan changes due to unforeseen field circumstances, such as relocations of rights-of-way, property boundaries, changes of grade by more than one percent, or other modifications requiring Planning Board review per section 16.10.3.2, must be reviewed by the Planning Board.*

There were no changes to Title 16.10.9.3 Modifications to an Approved Plan

[A motion and vote was not made on the recommended changes, however the revised section will be edited for review and discussion at the July 25, 2013 meeting.]

ITEM 3– Town Code Amendment – Right-Of –Way Plan Review Application, Title 16, Land Use Development Code. Discuss what changes may be required to meet the goals determined by the Board. A discussion on the town allowance for Right-Of-Way Plan Review and Approval and if modifications to the Code are warranted in order to support planned growth and development goals stated in the Comprehensive Plan.

Mr. Emerson read the definition of a driveway: *Driveway means a vehicular access way less than five hundred (500) feet in length serving two lots or less.* There is a separate definition for rights of way. The issue is ‘roads to nowhere’ where a driveway is created to large lots without Board review. Ms. Tuveson stated rights of way had to be platted and recorded. Mr. Mylroie explained there is no limitation in the ordinance on a property owner who has a large piece of land to remove trees or build a driveway for a single family home. He would recommend eliminating right-of-way plans, however state law allows for rights of way, land division, and curb cuts without Board review. Mr. Emerson suggested if a right of way is created, a development plan must be submitted as well. Ms. Driscoll suggested reviewing the Saco and Cape Elizabeth ordinances regarding rights of way.

There was no action on this item.

Mr. Melanson suggested the Board move to Item 5 as the applicant is waiting. Board members agreed.

ITEM 4– Town Code Amendment – 12.1 Excavations, Title 12, Streets, Sidewalks and Public Spaces. Review amendment and determine to make a recommendation to Town Council. Amend Section 12.1.2 Issuance and record of permits to include the Town Planner and Code Enforcement Officer prior approval to the Commissioner of Public Works issuing permits for driveway cuts.

Mr. Mylroie summarized this was a staff recommendation so the Planning Department is aware of curb cuts and can forward to the Planning Board. Ms. Tuveson asked if multiple curb cuts are allowed regardless of lot size or frontage. Mr. Emerson stated if there is a curb cut request to property that is large enough to support three lots, the Board needs to be aware of the request.

Following discussion, the following changes [underlined] were recommended [no action taken]:

***12.1.2 Issuance and Record of Permits.***

*The Commissioner of Public Works is authorized to issue permits and is to keep a record of all permits granted.*

*Where there is sufficient acreage for development that would require review and approval under Title 16 of the Kittery Municipal Code, prior to the issuance of a Driveway Entrance Permit, a copy of the application, if not part of a previously approved plan by the Planning Board, must be submitted for review and approval by the Town Planner and Code Enforcement Officer.*

The Board requested a workshop be scheduled with the Commissioner of Public Works and Planning Board on Thursday, July 18, 2013 at 6:00 p.m. This workshop will also include the rights-of-way ordinance amendment discussion.

There was no further action.

**NEW BUSINESS**

ITEM 5 –Town Code Amendment - Chapter 7, Article 3 Nonconformance, Title 16 Land Use Development Code. Action: Review proposed amendment and, if favorable, schedule a public hearing. Amendment includes changes to 16.7.3.5.10. *Contiguous Non-Conforming Lots* that would allow for more consistent adjustment to lot-lines. Applicants Mary Thron and Ray Arris, Kittery residents.

Mr. Mylroie explained in order to adhere to the ordinance as it is written, gerrymandered lots are created. The applicant proposed changes to the ordinance to address this problem.

Mary Thron, 73 Tower Road, explained they wished to move the property line to provide more land area for the smaller lot to allow for a septic system. In order to do so, the property line could only be adjusted equally between the two abutting properties. The proposed amendment *..would enable the Board of Appeals to approve a lot line adjustment that would improve the overall conformity of adjacent non-conforming lots of record. Benefits would include reduction of side setback non-conformities and would alleviate the hardship of having to resort to easements or condominium ownership to overcome setback issues or other constraints.*” [from Thron/Arris Application: *Zoning Amendment Change*, dated 5/22/13]

David Jones, Attorney, explained this is not a unique circumstance for shorefront developments created in the early half of the 20<sup>th</sup> century. If an owner wishes to adjust a property line due to building locations, neither lots created by adjusting the lines may be reduced, creating zigzagged property lines. If there are two houses on a single lot, the Board of Appeals may allow the division as long as it creates the least non-conforming separation. The proposed amendment to the ordinance is as follows:

*Section 16.7.3.5.10.D Adjustment to Boundary. If two contiguous non-conforming lots of record are each occupied by a legally created principal structure, the boundary between the two lots may be adjusted*

*provide the Board of appeals determines that the proposed relocation of the boundary would be permitted under Section 16.7.3.5.10.C (Single Lot Division) if the two lots were considered a single lot legally created for purposes of that section.*

He spoke with Michael Morris from the DEP who explained any ordinance affecting the shoreland zone requires DEP approval, and this proposed amendment could be submitted for DEP comment prior to a public hearing.

Mr. Emerson asked if there is a non-conforming lot next to a conforming lot, could this also be allowed.

Mr. Jones stated if the line change created a non-conforming lot from a conforming lot the existing ordinance would not allow this. This proposal addresses numerous grandfathered non-conforming lots currently in existence.

Ms. Driscoll asked why a septic easement is not acceptable in this situation.

Mr. Jones explained there were four possible solutions:

1. Gerrymandered lot lines;
2. Easement for the septic system;
3. Combine the two lots and create a condominium ownership arrangement;
4. Seek an ordinance amendment.

Having another individual's septic system on your property or vice-versa would make the property less desirable. This ordinance amendment proposal seems a practical way to address the issue that affects others as well.

Ms. Driscoll asked if this side steps a variance. Mr. Jones said it was not as a variance would be to vary the setbacks or dimensional requirements, and the Board of Appeals would allow the lot line adjustments, but in a zigzagging fashion. In this case, the applicant wishes to move the lot line in order to gain additional property should a new septic location be needed, however, it is not a need at this time. Ms. Thron explained the septic system issue was part of the February application submitted to the BoA, but is not part of their current request before the Planning Board. The ordinance request would simply make a non-conforming lot less non-conforming through a more practical property line change. She stated because of the size of the lot, existing wetlands and the shoreland, there is minimal area for a new system, and a property line adjustment would also provide more yard area to the smaller lot.

Mr. Emerson stated that, in summary, the lots would still remain non-conforming, but the division would be more practical. Conformance as a general rule is a good idea, but a practical division of land increases the value of the property and reduces the needs for easements between property owners.

Mr. Jones explained the current ordinance section (16.7.3.5.10) as two sub-section 'C's, and suggested their proposal would follow the second 'C' subsection and probably be renumbered as 'D'.

Ms. Tuveson moved to schedule a public hearing on this item

Ms. Grinnell seconded

Motion carried unanimously

#### ITEM 6 – Board Member Items / Discussion [not discussed]

- A. Review the Board's punch list, update and establish priorities;
- B. Review the By-Law changes suggested by Councilor Dennett;
- C. Discuss information learned at a recent workshop on municipal planning boards; and
- D. Other

ITEM 7 – Town Planner Items:

A. Review and act on other T-16 amendments that include:

a) 16.10.8.2.1 Planning Board Review and Decision – Final Plan Conditions – General (related to off-site improvements);

Mr. Mylroie explained the inclusion of language for conditions of approval would cover *on-site as well as off-site improvements related to the project*. No action was taken.

b) 16.10.8.2.2 Performance Guaranty Conditions;

Mr. Mylroie stated performance guarantees need to include stabilization and soil erosion controls. By noting this separately, the developer could defer other bonding requirements of the approved project. Discussion followed regarding the full financial requirements that should be expected of the developer. Mr. Emerson stated this should be deferred until clear.

c) 16.8.9.4 Off – Street Parking Standards;

*M. The Town Planning Board may approve the joint use of a parking facility by two or more principal buildings or uses ....*

Mr. Mylroie explained this change [underlined] allows shared use of parking during off-hours to meet the required parking standards between uses. He felt this is better determined by the Planning Board versus the Board of Appeals. Mr. Emerson stated this works in the planning process, but what about a change of use. Mr. Mylroie stated a change of use is reviewed by the Code Enforcement Officer and Town Planner.

d) 16.10.9.1.4.B Approved Plan Expiration.

Staff recommends this changed [underlined] to read:

*A non-subdivision plan's approval by the Planning Board will expire if work on the development is not commenced within one year and substantially complete within two years ....*

Ms. Wells stated some developments request extensions after there have been changes to the ordinance.

Mr. Melanson moved to schedule a public hearing for code amendments a [Final Plan Conditions], c [Off-Street Parking Standards] and d [Approved Plan Expiration], and defer amendment b [Performance Guarantee Conditions] to July 25, 2013.

Mr. Balano seconded

Motion carried unanimously

B. Residential Growth Management [not discussed]

C. Quality Improvement overlay zone; [not discussed]

D. Other

Ms. Wells asked about the status of the rain garden.

Mr. Mylroie stated the work is underway based on the DEP review of the violations and the required corrections to those violations.

Ms. Tuveson moved to adjourn

Mr. Balano seconded

Motion carried unanimously by all members present

The Kittery Planning Board meeting of June 27, 2013 adjourned at 9:20 p.m.

Submitted by Jan Fisk, Recorder